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March 17, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: February 3, 2004
Case No.: TIA-0047

XXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, this matter should be remanded to OWA for further action.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a Physician Panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination, and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R.

1/ See www.eh.doe.gov/advocacy.

Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application, the applicant asserted that from 1951 through 1953, her husband worked as a pipefitter at the DOE's Paducah, Kentucky gaseous diffusion plant. See 10 C.F.R. § 852.2. The worker died in 1996 of heart disease. The applicant believes that exposure to asbestos at the plant caused her husband to suffer from asbestosis and lung cancer.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the applicant's claim of asbestosis, the Panel noted that the worker's "employment at Paducah with the possible exposure to asbestos may be related to the development of his benign asbestos induced pleural disease." The Panel noted that the worker's medical "records do not reveal any . . . test in which he was found to have asbestosis." It was also the opinion of the Panel that the worker did not suffer from asbestosis. Accordingly, the Panel issued a negative determination with respect to this illness. The Panel did not address whether it is at least as likely as not that the worker's pleural disease was caused, aggravated or contributed to by exposure to asbestos at a DOE facility. The Panel also did not address the applicant's lung cancer claim.

II. Analysis

The applicant seeks review of the Panel's determination, maintaining that the Panel did not reach a complete determination on this claim. The applicant indicates that a determination should have been made not only on the asbestosis claim, but also on lung cancer. She asks that a review of the file be made with respect to lung cancer and has enclosed pathology reports and a final hospital discharge report for her husband with respect to this disease. This evidence was also in the record sent to the Panel. In her appeal, the applicant does not challenge the Panel's rejection of the asbestosis claim.

A. Asbestos Related Disease

It is clear that the record in this case does not show that the worker suffered from asbestosis. However, as the Panel recognized, the worker was diagnosed in 1986 with benign asbestos-induced pleural disease. It was the opinion of the Panel that the worker's employment at Paducah "with his possible exposure to asbestos may be related to the development of his Benign Asbestos Induced Pleural Disease." However, since the applicant's claim was based on asbestosis, from which the worker did not suffer, and not on "asbestos-induced pleural disease," the Panel issued a negative determination.

As a rule, Physician Panels in these cases are not expected to reach out and consider illnesses not specifically claimed by an applicant. For example, if an applicant bases a claim on asbestosis, a Panel is not expected to consider whether a worker's diagnosed skin cancer was caused by exposure to a toxic substance at a DOE facility. However, in this case, even though the worker did not suffer from the claimed disease, asbestosis, he clearly did suffer from a related lung condition caused by exposure to the same substance, asbestos. The Panel specifically recognized that the worker suffered from asbestos-induced pleural disease. This condition is considered to be a precursor to asbestosis, as well as an independent disease. Some applicants perceive asbestosis to include pleural disease, and for this reason do not request separate consideration of that illness. In this situation, I believe that the Panel should have considered whether it is at least as likely as not that exposure to asbestos at the Paducah Plant was a significant factor in aggravating, contributing to or causing the worker's asbestos-induced pleural disease.

Accordingly, I will remand this case to the OWA for further action on this issue.

B. Lung Cancer

The record regarding the lung cancer claim is not a consistent one. In an April 2002 document entitled "Request for Review by Medical Panels,"

the applicant claimed lung cancer as the illness caused by her husband's work at Paducah that she wished the Panel to consider. Asbestosis was not mentioned. Record at 2. However, the record refers to a telephone conversation of August 13, 2003, in which the applicant was asked whether she was claiming both asbestosis and lung cancer. The record states that the applicant replied that she was claiming only asbestosis. Record at 18. Accordingly, this case was sent to the Physician Panel for review solely on the asbestosis claim. The applicant now maintains that she intended that both illnesses be reviewed. She does not recall the August 13 phone conversation, although she does not deny that it took place. See Memorandum of March 9, 2004 telephone conversation with applicant.

As indicated above, a Physician Panel is not expected to issue a determination with respect to an illness not claimed by the applicant. It is clear that the lung cancer matter was not sent to the Panel as a disease to consider. Therefore, the Panel did not err in not considering this illness.

Overall, it appears to me that at one point the applicant did request that lung cancer be omitted from her application. The applicant now seems confused about this issue. As a matter of common sense, I believe that the applicant must have made a mistake in asking that the lung cancer claim be excluded. Given that I am remanding this case on the issue of pleural disease, I believe that as part of that remand, the Panel should consider the lung cancer claim. 2/

Accordingly, the appeal should be granted and this matter should be remanded to the OWA for further action consistent with this Decision.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0047 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.
- (3) This is a final Order of the Department of Energy.

2/ But for her confusion and the fact that this case is being remanded on the pleural disease issue, the applicant would be required to file a new application with OWA for consideration of the lung cancer issue.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 17, 2004